INDEX

CITATIONS

727-931—64——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

COLGATE-PALMOLIVE COMPANY AND TED BATES & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit, entered in this case on December 17, 1963.

OPINIONS BELOW

The first opinion of the court of appeals (R. 37–46) [1] is reported at 310 F. 2d 89. The second opinion of the court of appeals (App. A, *infra*, pp. 19–30) is reported at 326 F. 2d 517. The first opinion of the Federal Trade Commission (R. 9–34) is reported at 59 F.T.C. 1452. The second and third opinions of the Commission (R. 50–65, 106–109) are not yet reported.

[1] "R" refers to Petitioners' Consolidated Record Appendix filed in the court of appeals in the second proceeding before that court.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 31) was entered on December 17, 1963. On March 19, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission may prohibit, as an unfair or deceptive trade practice, the representation that a test, experiment, or similar demonstration shown on television provides the viewer with visual proof of a product claim (which may itself be true), when the test is a sham which proves nothing because of the undisclosed use of a "mock-up" in the test.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Commission's complaint charged respondents (an advertiser and its advertising agency) with having violated Section 5 of the Federal Trade Commission Act in connection with three 60-second television commercials for Rapid Shave shaving cream, which were widely broadcast on a national network in 1959 (R. 9). The advertisements are detailed in the Commission's first opinion (R. 10–12). They were described by the court of appeals as follows:

> The commercial was a dramatic "audio" and "video" exposition in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream. This demonstration, it was vocally claimed, "proved" the moisturizing qualities of the cream and that it would have the same effect "for you." In fact the demonstration did not employ sandpaper at all, but a simulated mock-up of sand on plexiglass. [R. 38]

On appeal from the hearing examiner's initial decision dismissing the complaint, the Commission, in an opinion by Commissioner Elman, concluded (1) that Rapid Shave could not shave sandpaper under the conditions depicted in the demonstration, and that respondents had therefore misrepresented the product's moisturizing qualities (R. 16); and (2) that, quite apart from the misrepresentation of the product's qualities, the undisclosed use of a mock-up in place of real sandpaper in the demonstration

was deceptive and unlawful (R. 19–23). Accordingly, the Commission entered an order both (1) forbidding respondents to misrepresent the quality or merits of Rapid Shave or any other shaving cream, and (2) forbidding them, "in describing, explaining, or purporting to prove the quality or merits of any product," to misrepresent "that pictures, depictions, or demonstrations * * * are genuine or accurate representations * * * of, or prove the quality or merits of" the product (R. 8).

On review, the Court of Appeals for the First Circuit, in an opinion by Judge Aldrich, set aside the Commission's order (R. 37–46). While fully sustaining the Commission's conclusion that respondents had misrepresented the qualities of Rapid Shave (R. 39–41), the court held that the Commission's order forbidding the undisclosed use of mock-ups in television commercials was too broad. It remanded the case for the Commission to draw a new order.

On remand, the Commission undertook in a second opinion to reconsider the entire case, restating the theory of law on which the "demonstration" part of the order was based and formulating an entirely new order responsive to the questions raised by the court of appeals (R. 50–65). The Commission stated:

> At the outset, we must emphasize what this case does and does not involve. The basic facts have never been in dispute. Respondents, in their television commercials for Rapid Shave, were not content merely to claim that its "super-moisturizing power" was so great that it could shave sandpaper. Had the commercials been limited to that claim, the case would have

> raised only the narrow factual issue of its truthfulness. Respondents saw fit to go much further and to "prove" the claim by "demonstrating" this purported quality of the product to the viewing public. Respondents were evidently aware that many viewers might not be willing to take their word for it that Rapid Shave could shave sandpaper. For those skeptical viewers, additional proof of the truthfulness of the claim was apparently thought necessary in order to sell the product. Respondents sought to exploit the popular belief that "the camera doesn't lie." By means of the "sandpaper test" demonstration, respondents in effect stated to the viewing public: "Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper." [R. 52–53]

The Commission emphasized that its decision did not forbid the use of mock-ups in television advertising under any and all circumstances:

> The Commission did not have before it any abstract question whether the use of mock-ups in television advertising is, in all circumstances, *per se* illegal; or whether, in a casual or incidental display of a product that cannot be faithfully reproduced on the television screen because of technical deficiencies in the photographic process, it is permissible to use

> substitute materials to overcome those deficiencies. Rather, a distinction was sought to be drawn between mock-ups that are used in demonstrations designed to prove visually a quality claimed for a product and are thus material to the selling power of the commercial, and those that are not. We entirely agree with the Court of Appeals, for example, that there is nothing objectionable in showing a person drinking what appears to be iced tea, but for technical photographic reasons is actually colored water, and saying "I love Lipsom's tea", assuming the appearance of the liquid is merely an incidental aspect of the commercial, is not presented as proof of the fine color or appearance of the tea, and thus in no practical sense would have a material effect in inducing sales of the product. [R. 55]

Paragraph I of the final order entered by the Commission on remand (after the Commission, in a third opinion (R. 106–09), again reconsidered the scope of the order) ordered respondent Colgate-Palmolive to cease and desist from:

> Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop

instead of the product, article, or substance represented to be used therein. [R. 102–103] [2]

Respondents again sought review of the Commission's order, and the court of appeals again set aside the order and remanded the case. This time, however, the court directed the Commission to "enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished" (App. A, *infra*, pp. 29–30).

The court did not limit its consideration to whether the Commission's decision on remand complied with the court's mandate; instead, it reexamined the Commission's position "on the merits" (App. p. 22). The court stated: "We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (App. p. 26). The court envisaged such "great difficulty in determining any dividing line between what is and what is not a test

[2] The order contains a similar provision directed against respondent Bates (except that the latter is specifically afforded a defense where it neither knows nor has reason to know that a mock-up was used in the test) (R. 103–04). It also forbids misrepresentations of product quality or merits, but that part of the order, as mentioned earlier, is apparently entirely acceptable to the court of appeals and is not in issue before this Court on this petition for certiorari.

or experiment, or in defining what is a demonstration in the nature of such" (App. p. 24), that is concluded there was "only one practical solution. It is to hold that, in the absence of any express statement, the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process * * *. If there is an accurate portrayal of the product's attributes or performance, there is no deceit". (App. pp. 28–29).

REASONS FOR GRANTING THE WRIT

As a result of the extended proceedings in this case, the issues have been narrowed to one: Whether under Section 5 of the Federal Trade Commission Act the Commission has the power to prevent the widespread use on television of advertising demonstrations that purport to furnish experimental proof of a product's quality or merits but in fact prove nothing because of the undisclosed substitution of a mock-up or other sham product in place of the articles that the demonstration falsely pretends to test. One way in which television's quality as a "live" medium has revolutionized advertising is by enabling the advertiser not merely to assert the merits of his product, but to provide "see for yourself" proof by tests, experiments, and other demonstrations. This is, accordingly, a test case of major importance with respect to the Commission's power to prevent deception in television advertising, in the interest of both the consuming public and honest advertisers.[3] In

[3] The case has received considerable attention in the law reviews. See Comment, 72 Yale L.J. 145 (1962); Note, 10 U.C.L.A. L. Rev. 417 (1963); 38 Notre Dame Lawyer 350 (1963);

addition, the court below exceeded the proper scope of judicial review by substituting its judgment concerning the application of the statutory standard of conduct and the framing of the appropriate relief for that of the agency charged with the administration of the Act.

1. The presentation of a picture of a sham performance with the representation that the viewer is watching an actual test is plainly an unfair or deceptive trade practice under established standards: It involves a deliberately false representation which is material in the sense that it furnishes an important inducement to sales. Honest advertising enables the consumer to make a free and informed choice among competing products, but the choice is impossible if one seller is permitted to misrepresent a fact that consumers consider material. As numerous decisions under the Federal Trade Commission Act make clear,[4]

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24 Ohio S.L.J. 558 (1963); 36 St. John's L. Rev. 274 (1962); 16 Vand. L. Rev. 977 (1963). It is, moreover, only one of a number of "demonstration" cases brought by the Commission. See *Hutchinson Chem. Corp.*, 55 F.T.C. 1942 (decided June 11, 1959); *Brown & Williamson Tobacco Corp.*, 56 F.T.C. 956 (consent order issued Feb. 24, 1960); *Libby-Owens-Ford Glass Co.*, F.T.C. Docket 7643 (decided July 16, 1963); *Aluminum Co. of America*, 58 F.T.C. 265 (consent order issued March 4, 1961); *Standard Brands, Inc.*, 56 F.T.C. 1491 (consent order issued June 1, 1960); *Lever Bros. Co.*, F.T.C. Docket 7747 (complaint dismissed Oct. 15, 1962); *Eversharp, Inc.*, 57 F.T.C. 841 (consent order issued Sept. 30, 1960); *Carter Products, Inc.*, F.T.C. Docket 7943 (decided April 25, 1962), reversed, 323 F. 2d 523 (C.A. 5); *The Mennen Company*, 58 F.T.C. 676 (consent order issued May 4, 1961).

[4] See, *e.g.*, *L. Heller & Sons, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7) (failure to disclose country of origin of product); *Federal Trade Commission* v. *Standard Education Soc.*,

it is irrelevant whether the misrepresentation goes to the objective characteristics of the advertised product, or involves some extrinsic factor which is material because it influences the decisions of purchasers.[5] Regardless of the wisdom or folly of purchasers' grounds for preference, deception with regard to those matters is unlawful, for "the public is entitled to get what it chooses" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78). Thus, the unauthorized use of a "Good Housekeeping Seal" would be unfair and deceptive even if the product met the "Good Housekeeping" standards. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); see R. 59. The same would be true of a false representation that a disinterested testing agency had certified that a product had certain objective characteristics, even though the product could be shown to have them in fact.

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86 F. 2d 692 (C.A. 2) (dishonest testimonials), modified, 302 U.S. 112; *Mohawk Refining Corp.* v. *Federal Trade Comm'n*, 263 F. Td 818 (C.A. 3) (that product is reprocessed); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (seller's trade status); *Steeloo Stainless Steel, Inc.* v. *Federal Trade Comm'n*, 187 F. 2d 693 (C.A. 7) (false disparagement of competitors).

[5] Such "extrinsic" frauds are not only deceptive, but also extremely unfair to the honest competitor who does not attempt to sell his products by concealing or misrepresenting material facts. "The Commission was not organized to drag the standards [of fair dealing] down" *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79. As the Commission stated in its second opinion in this case, "It would be ironical indeed if businessmen who do not resort to material deceptions in advertising their products were forced, as a result of a decision of the governmental agency responsible for enforcing truth in advertising, to do so or suffer competitively" (R. 60).

The present case falls squarely within these established principles. The Commission found that the Rapid Shave sandpaper test was represented as visible proof of the moisturizing qualities claimed for Rapid Shave shaving cream, and the court of appeals did not disturb this finding. Unquestionably, the sandpaper test was an effective advertising device and a material factor in inducing purchases by many consumers. It was plainly intended as such an inducement. As the Commission's first opinion states:

> [T]he pictorial test of "Rapid Shave," proving to any doubting Thomas in the vast audience that "By golly, it really *can* shave sandpaper!" was the clinching argument made by the commercials. The "sandpaper test" was conducted, as the announcer said, "[t]o prove Rapid Shave's super-moisturizing power. . . ." Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product. At least, respondents must have thought so, or else they would not have emphasized the pictorial "sandpaper test" in the expensive television advertisements of their product. One need only consider the difference in the impact of these commercials on viewers had they been told, honestly and truthfully, that what they were seeing tested was a plexiglass mock-up, rather than what they thought and were told they were seeing, namely, actual sandpaper. The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell" [R. 22].

The visible proof was a sham. What appeared, and was expressly represented to millions of viewers to be sandpaper was actually a plexiglass mock-up. The viewers were not informed of the substitution even though what was represented as a test was no test at all and although the representation of "proof" would be material to their decision to buy Rapid Shave. The Commission's power to forbid such false and material representations has never depended upon a showing that the purposeful deception results in harm to the purchaser; the dishonesty of this method of selling alone condemns it.

2. In setting aside the Commission's order, the court below not only misconstrued the statute by sanctioning the false and material representation but it improperly substituted its judgment for that of the Federal Trade Commission on matters confided by the statute to the expert judgment of the agency. The court's decision rests on the following reasoning: The inherent limitations of television often require the use of mock-ups or other substitutes in order to portray accurately the appearance or uses of a product; it is difficult to distinguish those admittedly legitimate uses of mock-ups from the sham experiments and tests that the Commission's order would forbid; unless the false representation that an actual experiment or test is being conducted involves misrepresentation of the actual merits of the product, the harm to the public is minimal; therefore the "only * * * practical solution" is to permit the sham experiments and tests so long as they involve "no

basic dishonesty" concerning the characteristics of the product.

We think it plain that it was for the Commission, not the reviewing court, to determine whether the harm done by permitting the continuance of this form of deception outweighs the possible gains from tolerating the pretended tests. In the words of Judge Learned Hand, "The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[6] See also, *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643; *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304; *Federal Trade Commission* v. *Standard Education Soc.*, 302 U.S. 112.

The Commission's determination that the harms of sham demonstrations outweigh the need for them is amply justified. The need is slight. The limitations of television may justify the undisclosed use of substitutes merely to portray a sponsor's product or illustrate its use, but no legitimate needs of sponsors justify the harm done by false representations that a sponsor is furnishing experimental proof of a product characteristic.[7] It is, of course, true that the techni-

[6] *Federal Trade Commission* v. *Standard Education Soc.*, 86 F. 2d 692, 696 (C.A. 2), modified, 302 U.S. 112.

[7] The Commission's order does not reach the use of substitutes in television commercials which merely state and portray a product claim. It applies only to the presentation of "a

cal limitations of television may prevent a sponsor from showing on television an experiment which it can perform and has performed elsewhere. But if the sponsor cannot prove its claim experimentally on television, it may still report and illustrate the tests it has performed elsewhere, so long as it lets the viewer know the truth—that he has only the sponsor's word and not visual proof to justify his belief in the sponsor's claim.

On the other hand, the harms of sham "proofs" are great. There can be no doubt that such statements, like representations that a product is being given away to slected persons, "give a competitive advantage to the less scrupulous seller and that they not only add nothing to the buyer's opportunities to buy wisely, but hold out to him false inducements." *Federal Trade Commission* v. *Standard Education Soc.*, 86 F. 2d at 696. Moreover, if sham experiments are permissible, television can never realize its potentiality as a medium through which those sellers of a superior product who can actually prove the truthfulness of their claims can convince buyers by performing bona fide tests or experiments before the eyes of the television viewer. For the viewer will not be able to distinguish the real experimental proof from the fake test and therefore will not be able to rely on any televised "demonstration" of superiority. There are additional harms as well. Because purchasers will pay

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test, experiment or demonstration that * * * is represented to the public as actual proof of a claim made for the product" and, as the court below noted, the Commission has indicated that the word "demonstration" is "to be read by the rule of *ejusdem generis*" to mean "demonstration 'in the nature of a test or experiment'" (App. p. 23).

more for a product if they believe its characteristics have been verified before their eyes by a televised experiment, a fake experiment causes them to pay for something they do not receive—objective confirmation of the sponsor's claims. Finally, the dramatic impact of visual "proof" of a sponsor's claims is likely to induce purchasers to buy a product which they believe has been "tested" before their eyes on television rather than another which, were it not for the misrepresentation of "proof," they would have preferred.[8]

The court below rested its decision in large part upon the problems of compliance, administration, and enforcement that it anticipated would be caused by the difficulties of distinguishing the prohibited misrepresentations of visual, experimental tests from the permitted uses of mock-ups or substitutes in other television commercials. But here, too, the judgment of the agency charged with administering the statute should have been accepted unless it was manifestly wrong; and here, too, the Commission's

[8] Thus, if a purchaser believes he has been shown experimental proof that a product has qualities A and B, he may prefer this product to another which claims, without proof, to have these qualities plus an additional quality (C) which he also values. Assuming that both products in fact have the qualities claimed for them, the misrepresentation of experimental proof causes the purchaser to receive less for his money than he should and unfairly deprives the competing seller of a sale he deserves. It is no answer either to the purchaser or to the disadvantaged competitor to say that the purchaser received a product with the qualities (A and B) he expected, for he would have purchased a different product and received more but for the misrepresentation of experimental proof.

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judgment was more than justified. The crucial terms of the order—experiment, test, or similar demonstration purporting to furnish visual proof of a product characteristic—are, at the very least, as precise as those generally involved either in the law of tortious misrepresentation (*e.g.*, the distinction between permitted representations of opinion and actionable representations of fact) or in the law of unfair trade practices (see, *e.g.*, *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 348 U.S. 940). The Commission's order involves no more than the normal questions of interpretation that arise in the practical day-to-day application of every order or decree.*

* See *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Comm'n*, 311 F. 2d 480, 487–488 (C.A. 2), where Judge Friendly pointed out that the compliance procedures of the Commission afford ample opportunity for clarification of the provisions of a cease and desist order without subjecting a respondent to the risks of a penalty proceeding. The Commission's revised Rules of Practice for Adjudicative Proceedings (28 Fed. Reg. 7080, 7091 (July 11, 1963)), which apply to this order, provide:

"Sec. 3.26(b) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

"(c) The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such

Finally, the Commission could fairly conclude that the difficulties of defining sham demonstrations are less serious than the administrative difficulties presented by any alternative method of dealing with the problem, including that suggested by the court below (App. p. 29, n. 17).

CONCLUSION

This case presents questions of substantial importance in the administration of the Federal Trade Commission Act warranting review by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1964.

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event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6145

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 6146

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On petitions to review an order of the Federal Trade Commission

Decided December 17, 1963

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges

ALDRICH, *Circuit Judge.* In 1959 petitioner Colgate-Palmolive Company, at the suggestion of its advertising agency, petitioner Ted Bates & Company, ran a series of television commercials purporting to show, by moving pictures and dialogue, that Colgate's shaving cream Palmolive Rapid Shave was so "moisturizing" that it would permit "tough" (coarse) sandpaper to be "shaved" immediately with a safety razor. The Federal Trade Commission, after a hearing, found that the seeming sandpaper which had been photo-

graphed as being shaved in the studio was a plexiglass "mock-up"; that even fine sandpaper could not be shaved immediately; and that coarse paper could not be shaved until "moisturized" for an hour. There being a clear misrepresentation, the Commission entered orders forbidding the continuation of such, or similar, advertising. In addition it forbad, except for purely background purposes, all further undisclosed use of mock-ups.[1] Petitioners, respondents in the proceedings below and hereafter so termed, had made the point that technical problems and imperfections in the photographic process sometimes required the use of mock-ups in order to effect entirely correct reproductions on the screen.[2] The Commission held this to be irrelevant even though no quality, attribute, appearance of, or feat which could be performed by, the product was inaccurately represented. On a petition for review, over respondents' opposition which we found conspicuously unmeritorious, we agreed with the Commission that there had been a material misrepresentation of the cream's ability to shave sand-

[1] For the broad scope of this order, applying to all "pictures, depictions, or demonstrations . . . not in fact genuine . . .," see our former opinion in this case, reported at 310 F. 2d 89 (1962), and Judge Wisdom's discussion thereof in *Carter Products, Inc.* v. *F.T.C.*, 5 Cir., 1963, 323 F. 2d 523.

[2] It is recognized, for example, that the brown color of iced tea disappears, so that it looks like water. Blue shirts must be worn to simulate natural white. The sand on sandpaper, it was found in this case, fails to reproduce, leaving an apparently plain surface. Some substances which may photograph correctly, such as ice cream or frosting, or the head on beer, melt under the hot lights. In other cases so many retakes may be required that even the actor might fade with repeated consumption of the advertised product. For these and similar reasons, physical properties must sometimes be "made up" or entirely replaced by "mock-ups" although the result is a faithful and accurate portrayal.

paper, and thus improper advertising. However, we agreed with respondents on the second aspect, and returned the case to the Commission for the formulation of a new order in accordance with our opinion. 310 F. 2d at 95. Contending that the new order failed to comply with our expressed views, respondents are back with new petitions.

Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion,[3] hereinafter the "second opinion," in which it recited that our "various suggestions" "in substantial part have been accepted." We reached a number of conclusions not labelled suggestions which the Commission was not free to disregard under the mandate. 15 U.S.C.A. § 45(i); see *Virginia Lincoln Furniture Corp* v. *Commissioner,* 4 Cir., 1933, 67 F. 2d 8 (comparable provision under the revenue acts); *cf. Morand Bros. Beverage Co.* v. *NLRB,* 7 Cir., 1953, 204 F. 2d 529, 532, *cert. den.* 346 U.S. 909. Respondents assert that it has done so in substantial measure.[4]

[3] We mention the length of this opinion lest it be thought that the ambiguities we are about to discuss were due to cursory or ill-considered expression by the Commission. In fact the Commission wrote still a third opinion when it put its present order in final form, and after respondents had asserted difficulties in interpretation. In this third opinion it said that it had now acted to "restate with clarity and precision the basis and breadth of our findings and order."

[4] See also, *e.g.*, Note, The Rapid Shave Case, 38 Notre Dame Law. 350, 354 (1963), "The Commission has not capitulated, but has merely withdrawn to regroup its forces." The Commission's response is that if it has departed from our opinion it is because we misunderstood its original intention, due in large measure to "extreme arguments" made by its counsel. Because of this we asked present counsel whether he had cleared his argument with the Commission, and received an affirmative reply. The importance of this will shortly become apparent.

But because much importance beyond this particular case has become attached to the Commission's antipathy to mock-ups, we will make an exception and reexamine its present[5] position on the merits rather than from the limited standpoint of whether it comports with our previous opinion.

The substance of the present order is contained in the following passage. Respondents are to cease and desist from,

> "Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein."

If, to ascertain what is meant by "demonstration" and "actual proof" of a material claim, one turns to the second opinion, one learns that a "demonstration" is something which "prove[s] visually a quality claimed" for a product as distinguished from a "casual or incidental display" which is "not presented as proof of the .... [quality] or appearance of the .... [product], and thus in no practical sense would have a material effect in inducing sales. . . ."[6] In the view of

[5] There is so much in the Commission's second and third opinion about our having misunderstood its original position that we are not sure whether we now have before us a new position, or merely its old one "restated." See fn. 3, *supra*.

[6] The Commission rephrases this in its brief as the difference between a mock-up which "displays or illustrates a claim," and one that purportedly "objectively" "proves its truthfulness." As

the Commission this language "resolved" any "ambiguity." In the balance of its opinion, directed to the scope of the order, the Commission discussed examples of admittedly material misrepresentation, such as improper disparagement of a competitor, dishonest testimonials, misrepresentation of the seller's trade status, or of its receipt of an award or of prominent patronage, and concluded with the following footnote,

> ". . . The misrepresentation would not have been greater or more material, but only more explicit, if the announcer had stated: 'this test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper.' The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of 'proof' that in fact was not proof."

At the oral argument, to test whether there was no ambiguity, we asked counsel for the Commission if an ice cream manufacturer showed an enlarged and appealing photograph of what was apparently rich, creamy ice cream which coincided exactly in appearance with its product, but was in fact a mock-up (see fn. 2, *supra*), it was not an attempt "to prove visually the quality . . . or appearance of the product" that might have a "material effect in inducing sales," and hence deceptive advertising. He replied this would be unobjectionable because "demonstration" in the Commission's order was to be read by the rule of *ejusdem generis,* and meant demonstration "in the nature of a test or experiment."[7] He added that a

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will be developed, we find this less than a clarification of what the Commission states (fn. 3, *supra*) was already "precise."

[7] See fn. 4, *supra*. The ice cream matter was dealt with less specifically in the second opinion, the Commission saying that such an illustration was proper if "incidental."

buyer would be "morally disillusioned" if he learned that he had witnessed a phony test, but that a buyer of the ice cream would be indifferent to the use of the mock-up.[8] The important difference, the Commission asserts, is that in the case of a test, as distinguished from a display or illustration, the viewer believes he has seen "proof" which transcends the advertiser's "word."[9]

While, as we said in our previous opinion, every undisclosed use of mock-up or make-up involves a "misrepresentation of a sort," we must consider the consequences of the Commission's order. In spite of the Commission's belief that it has resolved all ambiguities, we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts. We do not see, for instance, why any pictorial representation of delicious-seeming ice cream is not intended to "prove visually the quality . . . or appearance" of the product. Or, to turn to the Commission's footnote, that the exhibitor does not impliedly say, "This is our ice cream," just as much as the implied announcement, "This is real sandpaper," is attributed to Colgate.

The issue of implication goes deeper. If a manufacturer exhibits a bed sheet, in fact blue, but ap-

[8] In other words, to have seen simulated sandpaper wetted by shaving cream is less palatable than to have one's appetite whetted by emulsified cold cream.

[9] The Commission also claims that its toleration of such deception would be unfair to competitors. This would seem in this context a mere restatement of the Commission's position rather than additional argument.

parently white, in connection with advertising its soap, is this depiction something which merely "displays or illustrates a claim," and therefore benign,[10] or does it (improperly) imply there has been a test? Even if it does imply a test, is this permissible since because this was not "verified or proved by an experiment performed before the eyes of the viewer" (Commission's brief) he cannot believe he has seen "proof" independent of the advertiser's "word?"[11] If the mere exhibition of the doctored sheet is not forbidden (provided the total effect is correct), would it become a "demonstration in the nature of a test" if the sheet were shown being taken out of a washing machine? Again, if an adult may be pictured apparently enjoying allegedly delicious medicine (the Commission accepts fully the "I love Lipsom's" hypothetical in our earlier opinion, 310 F. 2d at 93, n. 7) does it become a test or a demonstration in the nature of a test if the supposed patient is so young that it may be thought that the smile of enjoyment was a spontaneous reaction? And if so, how young? Such questions, and others like them, may be readily put, not as the product of a fertile imagination, but as the result of ephemeral examination of current TV commercials.

The existence of such difficulties can only bring to mind the principle that an order must be capable of

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[10] See fn. 6, *supra*.

[11] In its first opinion the Commission said, "[A]n announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's 'whitening' qualities by pointing to the 'whiteness' of his blue shirt. The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not." We would hazard no guess as to the extent, if any, the Commission has now departed from this position.

practical interpretation. *F.T.C.* v. *Henry Broch & Co.*, 1962, 368 U.S. 360, 368.[12] The relative insignificance of the issue before us makes it particularly unwarranted to offend this principle. By hypothesis we are not talking about misrepresentation of any quality or appearance of the product, or whether it can or cannot perform the "test" which it is claimed to accomplish. We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or make-up. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree.[13]

In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one, like Colgate's, that effects

[12] While there is much meat in Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963), we suspect that respondents would find little nourishment in the author's thesis that the courts may be counted on to neutralize, at the stage of adjudicating violation or imposing penalty, excesses by administrative bodies. Nor does the Commission's suggestion of advisory administrative opinions seem a ready solution. We think the very suggestion indicates the Commission's failure to realize the scope of the problem.

[13] In *O'Day Corp.* v. *Talman Corp.*, 1962, 310 F. 2d 623, 626, n. 5, *cert. den.* 372 U.S. 977, we held that it was not unfair competition, where defendant sold, and could properly sell, a sailboat substantially identical to plaintiff's, for defendant to use in its advertisements a picture which in fact was of plaintiff's boat instead of its own. While in that instance the boat was not "performing," we do not think the result would have been different if she had been photographed under sail if their performance was the same.

a basic deception, and at other times, in speaking of the buyer's "disillusionment," proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented.[14] Nor are we impressed with the strength of the previously mentioned difference that in a "genuine" test the viewer has more "proof" than the advertiser's "word." Even here there is usually a significant dependence upon the advertiser's word. We may take judicial notice that commercials are normally prerecorded. We may also assume, although the matter is not adverted to by the Commission, that the exhibition of a test implies that it can always be carried out, and not that this was the rare exception. The Commission has never opposed prerecordings, nor do we think it should, yet on this vital implication there is only the advertiser's word. We see little difference between this and taking his word that the test depicted is a faithful reproduction in other respects.

The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involved positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, "only more explicit," if the announcer had affirmatively stated, "This

[14] We pointed out in our previous opinion there was a difference between claiming that one had received a certain testimonial when one had not, and merely reproducing (without disclosure) a copy of an actual testimonial because the original would not "photograph." The second opinion continues to talk only about the former.

is real sandpaper." The nub of this case, to return to our ice cream comparison, is either that Colgate impliedly says its depiction is real and the ice cream manufacturer does not, or that the misrepresentation is material in the case of the sandpaper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis. It would seem paradoxical to say that a misrepresentation that what is shown is the actual product is harmless while a misrepresentation as to something else is not. Yet we cannot see why if the representation is to be implied in one instance it is not in the other.

Under all the circumstances, we see only one practical solution. It is to hold that, in the absence of any express statement,[15] the only implied representation is that no basic dishonesty has been introduced into the picture by the photographic process. Such a principle would, we think, be of universal application, and would include all demonstrations whether in the nature of a test or otherwise. It would cover the situations we found troublesome in our previous opinion which the Board has failed to discuss,[16] and every case of mock-up or make-up

[15] Contrary to the Commission, we believe it may, within limits, be more serious for the advertiser to misstate affirmatively the details of what is being shown than to imply them. The very fact of affirmation, as well as indicating an actual intent, dignifies the representation. *Cf. NLRB* v. *Trancoa Chemical Corp.*, 1 Cir., 1962, 303 F. 2d 456, 461. We would doubt, for instance, that if a manufacturer stated, "This is an actual unretouched photograph of our ice cream," the Commission would regard it as immaterial that the subject was a mock-up.

[16] *E.g.*, a "genuine" demonstration in which the normal photographic process actually upgrades the product. See, also, fn. 14, *supra*.

purporting to reproduce on the screen an exact representation of the qualities and appearance of the product, or, in the case of a claim of performance, of an actual test. If there is an accurate portrayal of the product's attributes or performance, there is no deceit. Such a principle may not be meticulously perfect, but we believe it would lead to minimum uncertainty and go more nearly to the heart of the matter.[17] It would also avoid the inroads into the commercial's sixty seconds which would result from having to make the statement whenever mock-ups were used that the exhibition, though employing artificial aids, was a faithful portrayal of actual events, together with such other rehabilitating data as might be thought necessary to make the showing persuasive. While we do not make this the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need.

The principle we espouse has no special relationship to mock-ups, and to amend the present order along such lines would serve no particular purpose. Accordingly, we instruct the Board, as we thought we had directed it before, to enter an order confined to

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[17] The Commission makes the point that such permissive use of mock-ups would greatly increase its policing difficulties. The Commission clearly has such duties, and considering the substantial manner in which repondents' mock-up departed from the truth and their insistence even in this court that there had been no misrepresentation (see, also *Carter Products Inc.* v. *F.T.C.*, *supra*) we are sympathetic. There are, however, other solutions. For instance, there might be no objection to a properly formulated rule placing the burden of going forward (we do not mean burden of proof, *cf. United Aniline Co.* v. *Commissioner*, 1 Cir., 1963, 316 F: 2d 701) upon a party who uses a mock-up or make-up to show that no basic deception, as we have been using the term, was accomplished thereby. This burden might be particularly heavy if there was no "photographic" reason for employing a substitute.

the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished. However, as to what terms the new order should contain with respect to products and customers, we did not, as the respondents seem to feel, direct the Commission to enter the narrowest possible order. There is more than one way to deal with a "single offense," *cf. All-Luminum Products, Inc.*, FTC 11/7/63, particularly a blatant one. We do agree with respondents that the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct. In this situation we continue to believe that we should not comment on the precise terms of an order *in vacuo*. We will add, however, in view of the strenuous opposition expressed by respondent Ted Bates & Company to the so-called "imposition of a burden" of showing extenuation,[18] that respondent has misconceived the principle. The Commission has allowed it an escape, rather than imposed a burden. We see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate.

Judgment will be entered setting aside the order of the Commission. Further proceedings to be in accordance with this opinion.

A true copy:

Attest: [S] ROGER A. STINCHFIELD, *Clerk.*

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[18] The same order was entered against Bates as against Colgate, but with respect to Bates there was a proviso that lack of knowledge, or of reason to know, of the existence of a mock-up would be a defense.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6145

COLGATE-PALMOLIVE COMPANY, PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 6146

TED BATES & COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

DECREE

December 17, 1963

This cause came on to be heard on petitions for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission is set aside and the cause is remanded for further proceedings in accordance with the opinion filed this day.

By the Court:

[S] ROGER A. STINCHFIELD, *Clerk.*

A true copy:

Attest: ROGER A. STINCHFIELD, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1964